IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AHMAD FARAHMAND	:	CIVIL ACTION
	:	
v.	:	
	:	
WILLIAM S. COHEN and LT. GENERAL HENRY T. GLISSON	:	NO. 97-7952

MEMORANDUM AND ORDER

HUTTON, J. July 15, 1999

Presently before the Court are Plaintiff Ahmad Farahmand's Motion in Limine (Docket No. 23), Defendants William S. Cohen and Henry T. Glisson's reply (Docket No. 25), and Plaintiff's sur reply thereto (Docket No. 27). Also before the Court are Defendants' Motion in Limine (Docket No. 26) and Plaintiff's reply thereto (Docket No. 28). For the reasons stated below, the Plaintiff's Motion in Limine is **DENIED IN PART AS MOOT AND DENIED IN PART** and Defendants' Motion in Limine is **DENIED**.

I. BACKGROUND

Defense Supply Center Philadelphia ("DSCP") provides medical supplies, food, clothing, and other materials to agencies of the federal government. Plaintiff Ahmad Farahmand worked at DSCP. On December 12, 1996, the position of Supervisory Product Business Specialist ("Section Chief") opened in the Medical Material Directorate at DSCP. As advertised, the position entailed

planning, directing, and supervising operations providing medical supplies to agencies of the federal government.

The "Selecting Official" for the position was Paul J. Bellino. In December 1996, Bellino convened a panel of three DSCP supervisors to attend interviews and recommend four finalists. Bellino would then select the new Section Chief. Bellino chose Leo Coyle, Carl Maunz, and Roslyn Rogers to serve on the panel. In December 1996, Bellino also drafted interview questions. Bellino also established the following factors, with varying importance, to make the decision: interview, experience, performance rating, awards, and education. The interview was the most significant factor.

On January 21, 1997, DSCP's personnel office referred thirteen (13) applicants, including the Plaintiff, to Bellino as qualified for further consideration for the position. Bellino reviewed the applications. In a summary rating sheet, Bellino then rated the applicants based upon his assessment of the candidates' qualifications as taken from the applications. Bellino rated the Plaintiff as "Excellent" in the categories of experience, performance rating, and education. Prior to the interviews, Bellino distributed his summary rating sheet to each panel member.

After the interviews, the panel recommended four candidates: Bruce Carson, John Charalabidis, Robert Little, and James Johanson. In making the final determination, Bellino

considered only these four individuals. Bellino selected John Charalabidis for the position. On February 28, 1997, Plaintiff received notice that he was not selected for the position.

On April 30, 1997, Plaintiff timely filed a formal complaint of discrimination with DSCP. In the complaint, Plaintiff alleged that DSCP discriminated against him by not promoting him to Section Chief because of his age, national origin, and religion. The DLA performed an investigation and found no discrimination. Thus, on December 23, 1997, Plaintiff filed the instant action alleging that DSCP discriminated against him based upon his: (1) age, under the Age Discrimination in Employment Act (ADEA); (2) national origin, under Title VII of the Civil Rights Act of 1964; and (3) religion, under Title VII of the Civil Rights Act of 1964.

On May 25, 1999, Plaintiff filed a motion in limine. On June 24, 1999, Defendants also filed a motion in limine. The Court addresses both motions.

II. DISCUSSION

A. Analysis of Plaintiff's Motion in Limine

In his motion in limine, the Plaintiff seeks to exclude three categories of evidence. First, Plaintiff seeks to exclude the affidavit of the selecting official, Mr. Bellino, and the affidavits of the selection panel members-- Ms. Rogers, Mr. Maunz, and Mr. Coyle. Second, Plaintiff seeks to exclude the agency's determination that Plaintiff was not a victim of illegal

discrimination. Third, Plaintiff seeks to exclude Defendants' USAO Summary Charts.

1. Affidavits

In their response to Plaintiff's motion, the Defendants state that they have no intention of using the affidavit of the selecting official, Mr. Bellino, or the affidavits of the selection panel members-- Ms. Rogers, Mr. Maunz, and Mr. Coyle. The Plaintiff thus agrees that his motion is moot in so far as it concerns these affidavits. Accordingly, the Court denies this part of Plaintiff's motion as moot.

2. Agency's Determination of No Illegal Discrimination

Plaintiff also moves to exclude the final agency decision of the DLA which concluded that Plaintiff was not discriminated against based on age, national origin, or religion. Plaintiff argues that this decision is hearsay pursuant to Rule 802 of the Federal Rules of Evidence and unfairly prejudicial pursuant to Rule 403 of the Federal Rules of Evidence. Defendants respond that the final agency decision of the DLA is in the form of an official report of a public agency, and thus falls within a hearsay exception under Federal Rule of Evidence 803(8)(C), and is not unfairly prejudicial.

a. Hearsay

It is within the sound discretion of this court to rule

on the admissibility of an agency's probable cause determination regarding employment discrimination. See Starceski v. Westinghouse Elec. Co., 54 F.3d 1089, 1099 n.12 (3d Cir. 1995); Walton v. Eaton Corp., 563 F.2d 66, 75 (3d Cir. 1977). Federal Rule of Evidence 803(8)(C) explicitly excepts public records and reports "resulting from an investigation made pursuant to authority granted by law," from exclusion under the hearsay rule, because official reports contain inherent indicia of trustworthiness. Fed. R. Evid. 803(8)(C). Agency investigatory reports are admissible under Rule 803(8)(C) "unless the sources of information or other circumstances indicate a lack of trustworthiness." Id. Review of the trustworthiness of a report includes, but is not limited to, factors such as: "1) timeliness of the investigation; 2) the investigator's skill and experience; 3) whether a hearing was held and 4) possible bias when reports are prepared with a view to possible litigation." Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 167 (1988); see also Complaint of Nautilus Motor Tanker Co., 85 F.3d 105, 112 (3d Cir. 1996). The burden is upon the moving party to show negative factors to convince the Court that the report should not be admitted. See Beech Aircraft, 488 U.S. at 167; Nautilus Motor Tanker, 85 F.3d at 113.

The DLA final agency decision clearly qualifies as a report under Rule 803(8)(C). Thus, the DLA final agency decision, which was authored by officers charged with a legal duty and

authorized to conduct the investigation, is presumed admissible under Rule 803(8)(C). See Beech Aircraft, 488 U.S. at 161. Any opinions, conclusions, and recommendations are also admissible unless the Plaintiff demonstrates its untrustworthiness. See id. at 161-70 (holding that conclusions and opinions in government reports are generally admissible).

In this case, the Plaintiff failed to demonstrate that the DLA decision was untrustworthy. The agency conducted a timely investigation. There is no argument before the Court questioning the professionalism of the investigators. Furthermore, Plaintiff chose to waive a hearing even though he had a right to one. Finally, Plaintiff failed to raise any bias concerns which might have impeded a fair investigation. Indeed, the Plaintiff only challenges the "undue weight" placed on the interview during the selection process. This argument, however, does not demonstrate untrustworthiness of the DLA decision. Rather, as Defendants correctly note, this argument is the basis of Plaintiff's quarrel with the agency. Accordingly, the Court rejects Plaintiff's hearsay argument.

b. Unfair Prejudice

Plaintiff also argues that the decision of the DLA would be considered reliable by a jury and greatly prejudice him under Federal Rule of Evidence 403. Under Federal Rule of Evidence 403, relevant "evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. "Rule 403 does not act to exclude any evidence that may be prejudicial, but only evidence the prejudice from which substantively outweighs its probative value. Prejudice within the meaning of Rule 403 involves identifying a special damage which the law finds impermissible." Charles E. Wagner, Federal Rules of Evidence Case Law Commentary 145 (1996-97) (footnotes omitted).

The Plaintiff's argument is meritless. Plaintiff's argument states the reason that the DLA decision is presumed admissible under the Federal Rules of Evidence. Rule 803(8)(C) was drafted to recognize a policy of affording a presumption of reliability to government reports. In any event, Plaintiff failed to show how unfair prejudice resulting from the admission of the DLA decision would substantially outweigh its probative value. Accordingly, the Court denies Plaintiff's motion to the extent that it seeks to exclude the DLA decision.

3. USAO Summary Charts

Finally, Plaintiff asks the Court to exclude Defendants' Exhibit 28, USAO Summary Charts, because the Defendants failed to provide any information as to these charts in their Pre-Trial Memorandum. Defendants fail to address this issue in their response. Therefore, given the incomplete record, the Court will reserve judgment on this issue until the time for trial.

B. Analysis of Defendants' Motion in Limine

Defendants also filed a motion seeking to exclude several of Plaintiff's exhibits on two grounds. First, Defendants ask the Court to exclude Plaintiff's Exhibit 26, Uniform Guidelines on Employee Selection procedures, because the guidelines were repealed. Second, Defendants ask the Court to exclude all exhibits which did not exist at the time of the failure to promote Plaintiff.

1. Guidelines

Defendants contend that the Court should prevent Plaintiff from admitting or using the Uniform Guidelines on Employee Selection procedures. Defendants maintain that these guidelines were repealed. Plaintiff states that the guidelines are in fact alive and well.

The Court rejects Defendants' argument. Other than a conclusory allegation, Defendants offer absolutely no legal support to show that these guidelines have in fact been repealed. Indeed, the Defendants do not even provide the Court with a citation to the challenged guidelines. Therefore, the Court denies this aspect of Defendants' motion.

2. Exhibits Produced After Failure to Promote

The Defendants ask this Court to exclude all evidence that occurred after the failure to promote Plaintiff as irrelevant.

Defendants assert that the critical question in this case is what was the intent of the decision maker at the time of the alleged discrimination. Thus, Defendants argues that any evidence after such failure to promote is irrelevant.

Under Federal Rule of Evidence 401, "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "The standard of relevance established by [Rule 401] is not high." Carter v. Hewitt, 617 F.2d 961, 966 (3d Cir. 1980). Once the threshold of logical relevancy is satisfied, the matter is largely within the discretion of the trial court. See United States v. Steele, 685 F.2d 793, 808 (3d Cir. 1982). Federal Rule of Evidence 402 states: "All relevant evidence is admissible, expect as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. R. Evid. 402.

After the fact evidence is often irrelevant to a person's intent, knowledge, or state of mind at an earlier time. See, e.g., Gulbranson v. Duluth, Misabe & Iron Range Railway Co., 921 F.2d 139, 142 (9th Cir. 1990); Arnold v. Riddell, Inc., 882 F, Supp. 979, 993 (D. Kan. 1995); Sealover v. Carey Canada, 793 F. Supp.

569, 579 (M.D. Pa. 1992). This case law, cited by the Defendants, clearly supports this proposition for personal injury actions. See, e.g., Gulbranson, 921 F.2d at 142 (finding the fact that railroad was aware of problem in railroad in 1985 not probative of its knowledge of that problem in 1984); Arnold, 882 F. Supp. at 993 (finding video made six years after injury is irrelevant to prove warnings available in product liability case); Sealover v. Carey Canada, 793 F. Supp. at 579 (excluding evidence that manufacturer had knowledge of health risks posed by its product in 1961-62 where plaintiff had to prove manufacturer had knowledge prior to 1960). In the realm of discrimination, however, after the fact evidence possesses more relevance to a person's intent, knowledge, or state of mind. See Abrams v. Lightolies, Inc., 50 F.2d 1204, 1214 (3d Cir. 1995) ("Indeed, we have held that discriminatory comments by nondecisionmakers, or statement temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination."); Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 54 (3d Cir, 1989) (finding age biased comment relevant even when made subsequent to plaintiff's termination).

In this case, Defendants ask this Court to exclude any evidence that Plaintiff offers if it occurred after the alleged discriminatory failure to promote. The Court is unwilling to impose such a blanket ruling. The law in this circuit states that after the fact evidence may be admissible as circumstantial

evidence to show discrimination. See id. (finding age biased comment relevant even when made subsequent to plaintiff's termination). Therefore, the Court denies Defendants' motion.

An appropriate Order follows.

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O R D E R

AND NOW, this 15th day of July, 1999, upon consideration of the Plaintiff's Motion in Limine and Defendants' Motion in Limine, IT IS HEREBY ORDERED that:

(1) Plaintiff's Motion in Limine is **DENIED IN PART AS MOOT AND DENIED IN PART**; and

(2) Defendants' Motion in Limine is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.